Supreme Court, U. S.
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In the

Supreme Court of the United States

APRIL TERM, 1980

No. 79-744

GREGORY ALBERICO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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In the

Supreme Court of the United States

APRIL TERM, 1980

No. .....

GREGORY ALBERICO, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

The petitioner, Gregory Alberico, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, Tenth Circuit, entered in this proceeding on August 24, 1979.

OPINION BELOW

The opinion of the Court of Appeals in this case, as yet unreported, appears as Appendix A hereto, *infra*. No opinions were issued by the trial court as are pertinent here.

JURISDICTION

The opinion of the Tenth Circuit Court was entered August 24, 1979; the petitioner's timely Petition for Rehearing was denied on October 10, 1979. This Petition for Certiorari was timely filed within thirty (30) days from the date of the denial of rehearing aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The petitioner, Gregory Alberico, was convicted of theft of government property, possession of stolen mail, and conspiracy to convert government property. 18 U.S.C. §§371, 641, 1708. The questions presented for review are:

1. *Whether the intentional withholding by the prosecutor of material exculpatory evidence bearing on the defense of entrapment, which material evidence reflected the defendant's non-predisposition to commit the charged offenses, warrants a new trial where the disclosed facts previously withheld can be fully utilized by the defense?*

2. *Whether the release by the prosecutor to the media of selectivity pre-edited portions of videotapes of alleged offenses with the approval of the trial court and unbeknownst to the defense denied the defendant due process where the press release took place with the acquiescence of the trial court and resulted in the broadcast of highly incriminating telecasts shown within the community of an unsequestered jury?*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

In January 1977, Captain Gregory Alberico, a professional soldier and decorated Vietnam veteran who had enlisted in the United States Army when he was 18, became concerned about the financial future of his family as he approached mandatory retirement, and began betting heavily at Colorado Greyhound tracks. Despite his fervent desire to provide financial security for his wife and two daughters, Alberico's success at wagering was less than spectacular. By mid-February he was between $13,000 and $15,000 in debt.

At one of the tracks, Alberico met Bill Martin, a self-admitted con man and police informer who was also a habitue of greyhound racing. Although Martin gave the appearance of being a highly successful wealthy gambler, eventually Martin became indebted to Alberico for over $5,000 at a time when Alberico himself needed money desperately for his debts.

Martin discovered at this time that Alberico had three vouchers he had found which memorialized transfers of funds to the Rocky Mountain Arsenal. Martin convinced Alberico the vouchers were valuable and arranged a meeting at his apartment between Alberico and a person introduced as "Dom", who claimed to be a purchaser of stolen goods. "Dom" offered $7,300 for the checks, but, although Alberico needed money desperately, he refused to sell the checks to "Dom", despite repeated solicitation.

"Dom" was in reality, however, an undercover F.B.I. agent who Martin was instructed to introduce to Alberico by an agent investigating Martin. Later, however, Martin gave Alberico a telephone number and the name "Mike" and later still Alberico called the number and asked for "Mike". In so doing, he had called the number of a so-called "storefront" undercover fencing operation staffed by law enforcement agents.

"Mike", too, was an F.B.I. agent. A meeting was arranged, to take place at the "storefront".

At their meeting, "Mike", fully aware of Alberico's financial plight, encouraged Alberico to sell the transfer vouchers to him, indicating that the proposed transactions would establish Alberico's "retirement fund". Eventually, Alberico did sell the vouchers to "Mike".

"Mike" began escalating his persuasion, in the meantime, encouraging Alberico to procure explosives for him. "Mike" would display a pistol, which he kept in his desk

at the "storefront" office. His enunciated purpose for displaying the gun was to enhance his "role playing" as a "tough guy", an Italian gangster from Chicago. After continual urging, Alberico did deliver to "Mike" a quantity of plastic explosives, but Alberico refused to deliver the necessary military detonators along with the explosives.

No further transactions occurred even though the enticements proffered included direct threats communicated to Alberico and his wife, Elsa. Elsa Alberico described her husband during this period as "a broken man." Small wonder she was actually relieved to find out upon her husband's arrest that "Mike" was not a gangster, but rather was an F.B.I. agent intent on successful prosecution of her spouse.

The trial was held in a rural Western slope Colorado town because of the obvious danger of inordinate publicity as foreshadowed by extensive pretrial publicity. "Mike" was the initial witness, and during his testimony, videotapes of the defendant and his initial conversations with "Mike" were shown to the jury. That very evening, immediately following the testimony, previously edited excerpts of the videotapes released by the prosecution with full knowledge of the trial judge were then broadcast. Defense motions for mistrial were denied, the trial court refusing even to hold an evidentiary hearing on the matter. The unsequestered jury was only briefly inquired of concerning their viewing of the telecast, and trial proceeded forward without the defendant having been given a chance to make a record concerning claimed denial of due process through prosecutorial misconduct.

News broadcasts of similar content were aired the following night, and renewed mistrial motions were denied. During the course of argument on the renewed mistrial motion, however, the trial court revealed that it had had prior knowledge of the prosecutor's intentions to unilaterally release the videotapes to the media for broadcast *during the trial.*

Upon conviction, Alberico was sentenced to a combination of concurrent and consecutive sentences equaling twenty years in duration. In addition, the court imposed fines equaling an aggregate of $44,000.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE INTENTIONAL WITHHOLDING BY THE PROSECUTOR OF MATERIAL EXCULPATORY EVIDENCE BEARING ON THE DEFENSE OF ENTRAPMENT, WHICH MATERIAL EVIDENCE REFLECTED THE DEFENDANT'S NON-PREDISPOSITION TO COMMIT THE CHARGED OFFENSES, WARRANTS A NEW TRIAL WHERE THE DISCLOSED FACTS PREVIOUSLY WITHHELD CAN BE FULLY UTILIZED BY THE DEFENSE.

It was obvious, from the very outset of the prosecution, that the defense was that of entrapment. Despite this fact, however, the prosecution at no time revealed to the defendant the fact that "Dom," the individual Alberico had refused to sell the checks to, was in fact an F.B.I. agent, despite the obviously exculpatory character of such information as it related to Alberico's non-predisposition to commit the crime of sale of government property. The key question was that of predisposition. *See United States* v. *Russell,* 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973). *See also Hampton* v. *United States,* U.S. , 96 S.Ct. , 48 L.Ed.2d 113 (1976).

Martin set up the meeting between Alberico and "Dom", and, knowing "Dom" to be an undercover agent, Martin evidently arranged the meeting in hopes that it would work to his advantage in the investigation then pend-

ing against him. Despite repeated attempts by "Dom", Alberico steadfastly refused to sell the transfer vouchers.

But, at the time of trial, Alberico and his attorney had no inkling whatsoever as to the true character of "Dom". Despite defense motions for exculpatory materials, the defense thought because of what was provided on discovery that the F.B.I.'s direct involvement began only with the telephone call to "Mike" upon Martin's encouragement, and so it was decided, as a matter of strategy, to underplay the prior meeting with "Dom", for although that was compelling evidence of non-predisposition on the part of the defendant, the defense believed the jury might be prejudiced against Alberico if it were to learn of this prior meeting between him and a so-called "fence".

As a consequence, the defendant's opening statement did not mention "Dom", nor was there any reference to specific evidence showing lack of pre-disposition. Then, when the videotapes of the initial meeting between "Mike" and Alberico were viewed by the jury, and the jury heard Alberico assert that the checks could be sold for $7,000, the jury at that time had not been supplied a complete factual outline, via the defense opening statment, which would enable it to put Alberica's statement in proper context. It simply did not know that "Dom" had previously told Alberico that the checks could be sold for approximately $7,000, and the reason the jury was not told this during the opening statement of the defendant was because the defense did not know that "Dom" was an F.B.I. agent. The showing of the videotape without this basic background, therefore, was devastating evidence of pre-disposition of incalculable prejudicial effect.

Without question, pretrial knowledge of the F.B.I's true full involvement would have drastically altered the defendant's preparation for trial. This critical evidence on the issue of predisposition would have been the focal point of the opening statement, which in turn would have lessened the devastating effect of Alberico's apparent expertise and willingness to sell the checks which appeared in the videotape of his first meeting with "Mike." Defense counsel could then have presented the jury with the true picture, that of massive solicitation which eventually wore down Alberico to the point that he was willing to engage in "crimes" with F.B.I. agents. The intentional nondisclosure of critical exculpatory evidence hindered Captain Alberico in the presentation of his defense, denying him due process and thus depriving him of the fair trial to which he was constitutionally entitled.

In *Brady* v. *Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this court declared as violative of due process non-disclosure of favorable evidence material to the issue of guilt. The petitioner would submit that here, the undisclosed information is patently material and exculpatory.

In evaluating materiality, this Court has stated that it is sufficient that the evidence be relevant to an important issue in the case. *See, e.g., Giglio* v. *United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 604 (1972). Thus, in order to assess materiality, the reviewing court must focus upon the theory of the prosecution and the nature of the defense. *People* v. *Murdock,* 39 Ill.2d 553, 237 N.E.2d 442 (1969).

Here, the government's theory was that Captain Alberico, a person predisposed to commit criminal acts, initiated a contact with a government agent and then committed a crime by selling government checks to the agent. The defendant's view was that he had not been previously inclined to make the checks available to anyone illicitly, but that governmental encouragement and enticement had caused him to finally sell the checks.

The issue was thus whether Capitain Alberico was or was not predisposed to engage in criminal activity prior to government intervention; whether, by governmental ac-

tion, the commission of a crime was induced, or whether it merely gave the accused an opportunity to continue on a "course of criminal conduct upon which [the defendant] had earlier embarked." *Lopez* v. *United States,* 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963). And here, just as the existence of an eyewitness would be highly material to a defense of alibi, *see United States ex rel. Meers* v. *Wilkins,* 326 F.2d 135 (2d Cir. 1964), evidence of prior unsuccessful governmental solicitation was highly material to the issue of predisposition inherent in the defense of entrapment.

Here, the undisclosed identity of "Dom" clearly satisfies the materiality requisites outlined in *United States* v. *Agurs,* 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), as the "substantial evidentiary significance" of "Dom's" identity cannot be doubted. *See Barbee* v. *Warden,* 331 F.3d 842 (4th Cir. 1964). The apparent willingness and expertise displayed by Captain Alberico with regard to the checks at the first meeting with "Mike" was the factual "linchpin" of the government's case, and under these circumstances it is sufficient that early disclosure *might* have affected the eventual outcome of the case. *Levin* v. *Katzenbach,* 363 F.2d 287 (D.C. Cir. 1966). Clearly, timely disclosure might well have affected the outcome of this prosecution.

The Court of Appeals found nondisclosure "troubling", but concluded that *Brady* was not invoked because of the fact that "Dom's" true identity was discovered during the course of the trial. Petitioner would concede that this suitation differs somewhat from that specifically discussed in *Brady* v. *Maryland,* but the focus and issues are the same: whether intentional nondisclosure by agents of the prosecution denies an accused due process. Here, just as in *Brady,* the accused was denied fundamental fairness in his preparation for trial, and his conviction should be reversed.

II. WHETHER THE *EX PARTE* AND EXTRAJUDICIAL RELEASE BY THE PROSECUTOR TO THE MEDIA OF SELECTIVELY PRE-EDITED PORTIONS OF VIDEOTAPES OF ALLEGED OFFENSES DENIED THE DEFENDANT DUE PROCESS WHERE THE PRESS RELEASE TOOK PLACE WITH THE ACQUIESCENCE OF THE TRIAL COURT AND RESULTED IN THE BROADCAST OF HIGHLY INCRIMINATING TELECASTS SHOWN WITHIN THE COMMUNITY OF AN UNSEQUESTERED JURY.

Trial was moved from the Denver area because of extensive pretrial publicity. Despite this fact, however, during the course of trial, and prior to introduction into evidence, the prosecutor gave the broadcast media selectively edited portions of videotapes, which were then broadcast throughout Colorado.

Defense motions for mistrial were denied, despite the fact that the videotapes in their highly edited form had been shown throughout the community of the unsequestered jury. The Court even denied the defense an evidentiary hearing on the apparent prosecutorial misconduct revealed by the factual circumstances, and inquired only briefly of the jurors whether or not they had seen the broadcast.

Later comments by the Court made it apparent that the "press release" of the prosecutor was done with the acquiescence and approval of the trial court. And, the trial court never permitted the defense to develop a record on how the "press release" had occurred and its impact on the petitioner's right for a fair trial.

The difficulty of maintaining an unprejudiced jury was viewed as grave, even in times past when only newspaper coverage threatened fair trials. *See Marshall* v. *United*

States, 258 F.2d 94 (10th Cir. 1958) *rvsd. on other grounds,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Holmes* v. *United States,* 284 F.2d 716 (4th Cir. 1960). The fear of external influences was reflected by the statement of Mr. Justice Holmes in *Patterson* v. *Colorado,* 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed.2d 879 (1907);

> "The theory of our system is that the conclusions to be reached in a case will be induced only by the evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

The need for such judicial recognition was exacerbated by the "onrush of an electronic age." *Rideau* v. *Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). In *Rideau,* this Court laid down the *per se* rule that the televising of a confession was an inherent denial of due process, mandating reversal of a later conviction without the necessity of a showing of actual prejudice.

The significance of *Rideau* was clearly established by the court's subsequent opinions in *Estes* v. *Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 7543 (1965); and *Sheppard* v. *Maxwell,* 384 U.S. 532, 85 S.Ct. 1507, 16 L.Ed.2d 600 (1966). As *Estes, supra,* pointed out, in *Rideau, supra,* the court:

> ". . . constructed a rule that the televising of the defendant in the act of confessing to a crime was inherently invalid under the due process clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial."

Thus, the *Rideau* rule was extended in *Estes* and *Sheppard* to include all circumstances where "a procedure employed by the State involved such a probability that prejudice will

result that it is deemed inherently lacking in due process." (381 U.S. at 542-3).

The thrust of this due process guarantee is that all possible precautions must be taken by trial courts to insure that verdicts be based on evidence, not publicity. *Sheppard* v. *Maxwell, supra. Sheppard* made a specific reference to the use of a "doctored" picture which was published for its sensational effect, much as the selectively edited videotapes aired in the present situation were broadcast in that form for maximum impact.

Indeed, trial courts have a continuing affirmative duty to insure that publicity and new broadcasts do not deny accuseds a fair trial. *See Gannett Co.* v. *De Pasquale,* U.S. , 99 S.Ct. , 61 L.Ed.2d 608 (1979). *See also Sheppard* v. *Maxwell, supra.* And here, in striking similarity to *Sheppard,* the constitutional deprivation was compounded by the trial court's conclusion that "it lacked power to control the publicity about the trial."

Here, the trial court's knowledge of the prosecutor's intentions left it with a number of means to safeguard Alberico's rights, including entry of an order prohibiting extrajudicial statements by trial participants. *See Sheppard* v. *Maxwell, supra; United States* v. *Gurney,* 558 F.2d 1202 (5th Cir. 1977); *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi* v. *Martin,* 431 F.Supp. 1182 (D. S.C. 1977); *United States* v. *Anderson,* 356 F.Supp. 1311 (D. N.J. 1973).

Hence, here, as in *Sheppard,* the deprivation of due process was exacerbated by the trial court's position that it lacked power to do anything about the impending "press release" countenanced by the prosecutor. The dereliction of duty in the within case is painfully apparent. Here, although the trial court had advance knowledge of the prosecutor's intentions, the court did nothing, failing even to notify the defense of the intended prosecutorial ploy. This

total abdication of authority simply cannot be condoned, nor can the consequences of such inaction on the defendant's rights be underestimated. As the Court in *Estes* made clear, the rationale for the *Rideau per se* rule was based on a number of considerations.

For example, extensive media attention overemphasizes the importance of the particular prosecution. *See Estes* v. *Texas, supra; Callahan* v. *Lash,* 381 F.Supp. 827 (N.D. Ind. 1974); *People* v. *Ulrich,* 376 Ill. 461, 34 N.E.2d 393 (1941). Indeed, the broadcast of accounts concerning particular items of evidence also serves to overemphasize the significance thereof, often to the considerable disadvantage of the accused. *Estes* v. *Texas, supra; Callahan* v. *Lash, supra; Sollars* v. *State,* 316 P.2d 917 (Nev. 1957).

Furthermore, as this Court in *Estes* explicitly recognized, there is a very real danger of influential community peer pressure resultant upon the televising of judicial proceedings, the prejudicial potential of which is increased where only selective incriminating portions are broadcast, since the jurors "cannot help but feel the pressure of knowing that their friends and neighbors have their eyes upon them." *Estes* v. *Texas, supra.* Community or peer pressure naturally generates reluctance to acquit because the jury realizes that the community viewed selectively some of the actual evidence of trial completely out of context.

Here, the Court of Appeals expressly disapproved the prosecutor's actions, but concluded that no constitutional rights of the petitioner were violated. However, the mere failure of the juors to acknowledge illicit influence is not determinative of the absence of prejudice where the circumstances compel the conclusion that, through the actions of the prosecutor, and the questions propounded by the Court, the jury in this case knew precisely the nature of the publicity. As numerous courts have pointed out, jurors are naturally reluctant to volunteer information concerning

their failure to heed admonitions to avoid contact with the publicity. *See, e.g., United States* v. *Accardo,* 297 F.2d 133 (7th Cir. 1962); *Coppedge* v. *United States,* 272 F.2d 504 (D.C. Cir. 1959).

This was graphically illustrated in *United States* v. *Coast of Maine Lobster Company,* 538 F.2d 899 (1st Cir. 1976), where only after repeated questioning and finally one affirmative response by juror did the remaining members of the panel admit to viewing certain publicity. Indeed, the Court's persistence in this regard resulted in the discovery that seven or eight of the jurors had viewed the publicity despite their initial refusals to admit it! Nor are mere admonitions to disregard publicity sufficient under these circumstances. As was pointed out by Mr. Justice Jackson in his much-noted concurrence, *Krulewitch* v. *United States,* 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Nor can the *source* of the prejudicial publicity be ignored. This is not a case merely involving publication or broadcast by the media of an account of the proceedings taking place within a courtroom, for here, what is tantamount to a confession was aired in a manner indistinguishable from the actual television coverage condemned in *Estes* and *Rideau,* through the direct participation and cooperation of the prosecutor. This was no less a subversion of the judicial process than was the televising of the confession in *Rideau,* and in some respects, it represents an even more reprehensible denial of due process, inasmuch as the circumstances reflect nothing short of an active involvement of the prosecutor in the preparation and perpetration of prejudicial publicity.

This factor of direct prosecutorial participation simply cannot be ignored. As was pointed out in *Sheppard, supra:*

> ". . . the fact that many of the prejudicial news items can be traced to the prosecution . . . aggravates the judge's failure to take any action."

Here, it is beyond question that the prosecutor violated his ethical duties in making available to the media portions or all of the videotapes. *See United States* v. *Gregorio,* 497 F.2d 1253 (4th Cir. 1974). Yet, this is not merely a matter of ethics. Rather, it involves the fundamental entitlement to due process and effective representation of counsel. The *ex parte* and extrajudicial release of the videotapes in the present case denied the petitioner of his right to an untainted trial by jury, and petitioner urges this Court to exercise its supervisory powers and set aside his conviction. *Marshall* v. *United States, supra; United States* v. *Coast of Maine Lobster Co., supra.*

CONCLUSION

This Petition for Certiorari presents issues of contemporary concern in criminal law. Both of the reasons presented for the issue in support of issuance of the writ involve intentional prosecutorial conduct designed to hinder the petitioner's efforts to defend himself on serious criminal charges. The crucial character of fair criminal discovery and criminal trials untainted by untoward publicity support issuance of a writ of certiorari to review the present convictions under this Court's supervisory powers.

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

GREGORY ALBERICO,
Defendant-Appellant.

Nos. 78-1053
Nos. 78-1062
Nos. 78-1063

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Case Nos. 77-00237, 77-00239, 77-00240)

Scott H. Robinson of Gerash & Springer, Denver, Colorado, for Defendant-Appellant.

Rod W. Snow, Assistant United States Attorney (with Joseph F. Dolan, United States Attorney, on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before SETH, Chief Judge, McWILLIAMS and McKAY, Circuit Judges.

McKAY, Circuit Judge.

The defendant was convicted, following a jury trial, on counts of theft of government property,[1] possession of stolen mail,[2] and conspiracy to convert government property.[3] He was acquitted on one count of theft of government property. His appeal raises issues of due process, fair trial, evidentiary insufficiency, prosecutorial impropriety, and cruel and unusual punishment.

The defendant was a United States Army captain assigned as the post administrator of the Rocky Mountain Arsenal in Colorado. He planned to retire from the Army, and was concerned about the economics of retirement. This concern was heightened by substantial gambling debts he had incurred. Utilizing his essentially unchecked access to facilities at the arsenal, the defendant sought to improve his financial situation by selling government property. He does not deny involvement in illicit transfers. His primary defense at trial was one of entrapment.[4]

At trial,[5] the defendant attempted to establish that a network of government agents and informants had caused him to commit crimes. His initial contact with the network came through Bill Martin, an FBI informant who apparently was under investigation for illegal activities himself. Martin participated with the defendant in his dismal gambling endeavors. He also encouraged him to use his status at the arsenal for illicit gain. At the suggestion of

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[1]18 U.S.C. § 641 (1976).

[2]18 U.S.C. § 1708 (1976).

[3]18 U.S.C. §§ 371, 641 (1976).

[4]He also challenged the allegations that some of the items illicity transferred had been shown to have "value" and that other items had been taken from the mail.

[5]Trial was originally scheduled for Denver, but defendant successfully moved for a relocation to Grand Junction, Colorado. The basis for defendant's motion was the extensive pretrial publicity generated in the Denver area.

FBI agent Richard Castillo,[6] Martin introduced the defendant to Dominic LaRocca, an undercover FBI agent,[7] who indicated that certain government checks in defendant's possession were valuable. Indeed, LaRocca offered $7,300 for these checks. The defendant rejected this offer, but subsequently contacted what later proved to be an FBI storefront operation to inquire about the sale of government property. The telephone number of the storefront operation had been given to Martin. Martin had, in turn, obtained it from Castillo.

The storefront operation was manned by Michael Kazmier, an undercover FBI agent known to the defendant as Mike Cairo. On several occasions Kazmier received government property from the defendant. The encounters with Kazmier were recorded by hidden microphones and videotape equipment. The defendant presented some evidence—which was challenged— that Kazmier had engaged in harsh threats to induce the defendant to turn over additional government property.[8] Although the defendant did not rely on a defense of duress as such, he argued that the threats were an integral psychological element of the successful effort to entrap him.

The entrapment defense was not accepted by the jury. Defendant's conviction on six of the seven counts charged against him resulted in imposition of a twenty year term of imprisonment and fines totaling $44,000.

I.

Defendant contends that his conviction should be reversed because certain exculpatory evidence was withheld from him by the prosecution. Relying on *Brady v. Mary-*

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[6]Castillo had been assigned to investigate Martin for fraud.

[7]LaRocca's true name was Dominic Civitano. His status as an FBI agent was not known to the defendant prior to trial.

[8]The government property actually transferred included plastic explosives, a cash register, and three checks made out to the Rocky Mountain Arsenal.

land,[9] 373 U.S. 83 (1963), defendant claims due process was violated by the prosecution's failure to advise him, in advance of trial, that Dominic LaRocca was in fact an FBI undercover agent. Defendant contends that the knowledge of LaRocca's true identity prior to trial would have assisted him in establishing an entrapment defense. He also claims it would have permitted more effective cross-examination and a stronger opening statement.

Although we find the nondisclosure troubling, we have concluded that the rule of *Brady v. Maryland* was not violated by the prosecution's pretrial failure to disclose LaRocca's actual identity. The simple fact of the matter is that the identity and involvement of LaRocca were uncovered during the course of trial. Although defense counsel's trial tactics were no doubt affected by the late discovery, he was able to put before the jury the involvement of LaRocca in the alleged entrapment. The Supreme Court has said that *Brady* applies in situations involving "the discovery, *after trial,* of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs,* 427 U.S. 97, 103 (1976) (emphasis added). Here, the information was discovered and presented at trial.

The difficulty with defendant's position can be seen from another perspective. *Brady* is implicated only when

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[9]In *Brady,* the defendant had requested before trial to examine the extrajudicial statements of his co-perpetrator, who was to be tried separately. A confession by the latter was withheld by the prosecution and did not come to defendant's attention until after his conviction and sentence had been affirmed on appeal. The Supreme Court held that

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad fatih of the prosecution.

373 U.S. at 87.

the evidence withheld is "material." It is noteworthy in this connection that defendant's basic argument is that nondisclosure hampered his trial preparations and affected his litigation strategy. But the Supreme Court has specifically rejected the proposition that the applicable standard of materiality should focus on the defendant's ability to prepare for trial. *United States v. Agurs,* 427 U.S. at 112 n.20. Rather, the inquiry is whether presentation of the evidence would have created "a reasonable doubt of guilt that did not otherwise exist."[10] *Id.* at 112. Application of that standard here would be nonsensical, of course, because the evidence *was* presented. Had it not been presented, we would obviously have a much different question before us.

II.

Defendant's next contention is that his constitutional right to a fair trial was denied by the prosecution's release to the press, with the trial court's acquiescence, of certain prejudicial evidence. Without apparent remorse, the prosecution concedes that it released copies of videotaped encounters between the defendant and Kazmier at the FBI storefront.[11] Selected, incriminating portions of these videotapes were publicly televised on at least two occasions during the course of the trial. Defendant argues that this publicity may have affected the result at trial, either because the jurors viewed it or because acquaintances of the jurors who observed it may have influenced the jurors.

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[10]This is the standard that applies when the defense has, as in this case, made a general request for *Brady* material. *See* United States v. Agurs, 427 U.S. 97 (1976).

[11]The government seems to believe that by releasing the videotapes it was merely furthering "the right of the people, through the press, to be informed of the workings of the judicial process." Appellee's Brief at 22. Salutary though this general goal may be, any furtherance of it by the Justice Department would be best left to the Department's Office of Public Information, rather than to individual assistant United States Attorneys in the context of ongoing prosecutions.

The standard for evaluating this issue was indicated by the Supreme Court in *Murphy v. Florida,* 421 U.S. 794 (1975). After referring to earlier cases in which due process violations had been found, the Court in *Murphy* said of those cases:

> They cannot be made to stand for the proposition that juror exposure to information about a state defendant's[12] prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.

421 U.S. at 799. The focus, then, is on the totality of the circumstances at trial.

Our review of the record in this case does not reveal that fundamental fairness was lacking in the defendant's trial. Several factors support our conclusion. First, the videotapes from which the television broadcasts were drawn had been shown previously to the jury as a part of the government's case. Second, the defendant relied on the defense of entrapment. In so doing, he admitted the acts giving rise to the prosecution. Therefore, the videotapes merely revealed the commission of acts which the defendant acknowledged he committed. Third, there is no indication that any jurors had been exposed to the broadcasts in any event. The morning after the initial broadcast, the trial

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[12]Since *Murphy* arose in the context of habeas corpus review of a state conviction, the Court was limited to considering whether the defendant had been so deprived of a fair trial as to violate his federal due process right. It is what the due process clause requires that we focus on now, and that minimum constitutional requirement is the same for federal and state defendants.

court was notified that it had occurred.[13] His response was to ask the jurors whether any of them had either seen the broadcast or discussed it with other individuals. None responded affirmatively.[14]

Under the circumstances described, we cannot conclude that any constitutional right of the defendant was violated by the broadcasts. This is not to say that we approve of the prosecutor's conduct in releasing the videotapes to the press. Indeed, we do not. The prosecution is commissioned to try cases in the courtroom, not in the airwaves.[15] Were the circumstances more egregious, we would not hesitate to exercise our supervisory powers and reverse the defendant's conviction. *See Marshall v. United States,* 360 U.S. 310 (1959); *United States v. Coast of Maine Lobster Co.,* 538 F.2d 899 (1st Cir. 1976).

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[13]It later appeared that the trial court had prior knowledge of, and had acquiesced in, release of the tapes to the press.

[14]This procedure was repeated the following day, with the same result. On this second occasion for inquiry, the court assured the jurors that he was not asking about exposure to publicity "with any thought of intimidation or threat." Record, vol. 12, at 17.

In addition to making these inquiries, the court had warned the jurors against discussing the case and had admonished them to avoid television, radio and newspaper accounts of the case. These warnings were repeatedly given throughout the trial.

[15]The government argues that the court would have imposed a prior restraint on the press if it had refused to permit the prosecution to release the videotapes. Although we need not reach this question, we note that there are some difficulties with the government's contention.

First, it appears that copies of the videotapes may have been released before their admission into evidence. Whatever right the press may have to copies of evidentiary materials, that right does not arise until after the materials become part of the public record. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 609-10 (1978); United States v. Gurney, 558 F.2d 1202, 1209-1210 (5th Cir. 1977), *cert. denied, sub nom.* Miami Herald Publishing Co. v. Krentzman, 435 U.S. 968 (1978). Even after such materials

III.

The defendant argues that he was improperly convicted of stealing government property to the extent the conviction was based on the sale to Agent Kazmier of three government checks. He argues that the government failed to prove the checks had any value.

The checks in question were United States Treasury checks drawn on the Kelly Air Force Base, in Texas, and made payable to the Rocky Mountain Arsenal. Each check bore the stamped signature of a United States Air Force disbursing officer. None of the checks were endorsed. The respective face values of the checks were $13,932, $29,538 and $30,096.

Stressing the statutory definition of the offense, the defendant argues that the government failed to prove that the checks had any value, much less value of at least $100. The applicable statute provides:

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become part of the public record, the press is not entitled to absolute access to them. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978).

A second difficulty is with the government's apparent perception that restraints on prosecutorial releases of information are equvalent to, or merge into, restraints on the press. We think there is a difference between imposing limitations on the prosecution and imposing limitations on the press. *See, e.g.,* Central S.C. Chapter, Soc'y of Prof. Journalists, Sigma Delta Chi v. United States Dist. Court, 551 F.2d 559, 562-63 (4th Cir. 1977); Farr v. Pitchess, 522 F.2d 464, 468-69 (9th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976); Central S.C. Chapter, Soc'y of Prof. Journalists, Sigma Delta Chi v. Martin, 431 F. Supp. 1182. 1188-89 (D.S.C.), *aff'd as modified,* 556 F.2d 706 (4th Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978). The prosecution is not free to release or say whatever it wishes about pending cases. *See, e.g.,* Code of Professional Responsibility, DR 7-107 (D). Moreover, the court has a responsibility to prevent those over whom it has control — including prosecutors — from frustrating the functions of justice. *See* Nebraska Press Assn. v. Stuart, 427 U.S. 539, 553-54 (1976); Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966).

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

18 U.S.C. § 641 (1976). Correctly observing that the government has the burden of proving the value element of the offense,[16] the defendant argues that the checks were not "things of value" within the ambit of the statute. In particular, the defendant contends that the government failed to show how an individual could cash checks made out to the Rocky Mountain Arsenal. If they had any value, claims the defendant, that could only be established with reference to a thieves' market, and the government failed to show what that market price was.

De agree that the government adduced no evidence regarding the checks' value in a thieves' market. We do not

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[16] *See* Stevens v. United States, 297 F.2d 664 (10th Cir. 1961) (per curiam).

think the $7,000 paid by Kazmier for the checks and other materials established such a market price. The storefront price was artificial. Kazmier himself admitted he had no idea what value the checks might have had in a true underworld exchange. Nor do we believe other theories of value advanced by the government, conjectural in nature, were supported by the evidence.[17]

We nonetheless affirm the defendant's conviction. Evidence of value in a thieves' market is unnecessary when face value is available. *See, e.g., United States v. Sarkisian,* 545 F.2d 1237 (9th Cir 1976); *United States v. Lee,* 454 F.2d 190, 192 (9th Cir. 1972) (per curiam). It is available here.

We are not persuaded by defendant's additional argument that conviction was improper because the checks were not shown to have had any intrinsic value to him. He complains that more than face value must be shown, or an individual could be prosecuted for "stealing" an otherwise conventional scrap of government paper on which had been written "$25,000." We concede that defendant makes a plausible argument for requiring an independent intrinsic value standard to be read into the statute, especially since

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[17]For example, the prosecution elicited speculative testimony that with sufficient alteration the checks could have been cashed by an individual. But if value were to be demonstrated on this basis, it would be necessary to establish what price the unaltered checks could have commanded in a thieves' market. No such evidence was adduced at trial. The use of rather strained value theories resulted from a perception that the question was somewhat difficult, given testimony that the government was actually "out" nothing as a result of the theft (payment had been stopped) and that checks made out to a government entity could not be cashed by private individuals. This confusion was unnecessary since it was clear that at the time of taking, the checks were negotiable instruments worth their stated face values to Rocky Mountain Arsenal.

the statutory definition of "value" can be seen as referring to the penalty provisions of § 641, rather than to the earlier reference to "thing of value." But even if we were to adopt defendant's general contention, we would not go so far as to require the government to prove intrinsic value to the *thief.* This would be an unwarranted construction of the statute. It is clear in this case that the checks were valuable to the Rocky Mountain Arsenal at the time they were stolen. Indeed, the face value of the checks defined their worth to the arsenal. The checks were "things of value" for purposes of § 641. Their face value was sufficient to engage the more severe sanctions available under the statute. Defendant's conviction was proper.

IV.

Two additional issues are raised. First, defendant contends that his convictions should be reversed because the storefront operation was improperly funded by the Law Enforcement Assistance Administration.[18] Even if this is true, we do not agree that dismissal of defendant's indictments is the proper remedy for sanctioning unauthorized agency spending.

Defendant's final contention is that the constitutional prohibition against cruel and unusual punishment was violated by the court's imposition of fines totaling $44,000 and consecutive sentences totaling 20 years. Defendant particularly complains about the imposition of a five year sentence for conspiracy to steal explosives and imposition of a ten year consecutive sentence for the theft of those same explosives. In imposing these sanctions, the court emphasized the fact that defendant had supplied large quantities of plastic explosives to individuals he believed to be criminals:

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[18]Defendant argues that only local law enforcement operations — not those of the FBI — should be funded by the LEAA. He refers to 42 U.S.C. §§ 3721, 3724, 3732, 3734 and 3766 (a).

> This is a case in which the defendant, for money, stole from the United States government, from the Army, enough explosives to kill countless people. . . . He thought that he was selling the explosives to persons who were going to use it [sic] in acts of terrorism, and I am totally unable to treat this case as a run-of-the-mill theft case.

Record, vol. 16, at 69. While the sentences imposed seem severe, they are within the limits established by Congress. Those limits are not " 'excessive' in relation to the crime[s] committed." *Coker v. Georgia,* 433 U.S. 584, 592 (1977). We therefore conclude the Eighth Amendment was not violated.[19]

AFFIRMED.

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[19]Although the defendant utilizes an Eighth Amendment rubric in challenging his sentences, most of his argument focuses on the appropriateness of the penalties imposed in light of the circumstances of his case. We are without power to review the soundness of lawfully imposed sentences that are within the maximum limits established by Congress, when those limits are constitutionally valid. *See e.g.,* Dorszynski v. United States, 418 U.S. 424, 440-41 (1974); United States v. Baer, 575 F.2d 1295, 1299 (10th Cir. 1978).